

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

74-1270

To be argued by
JOHN D. GORDAN III

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1270

UNITED STATES OF AMERICA,

—v.—

JOSEPH MAURO,

Defendant-Appellant.

B
Appellee
P

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,

*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

JOHN D. GORDAN III,

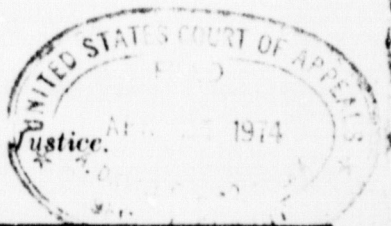
S. ANDREW SCHAFER,

*Assistant United States Attorneys,
Of Counsel.*

MICHAEL C. EBERHARDT,

Special Attorney,

United States Department of Justice.



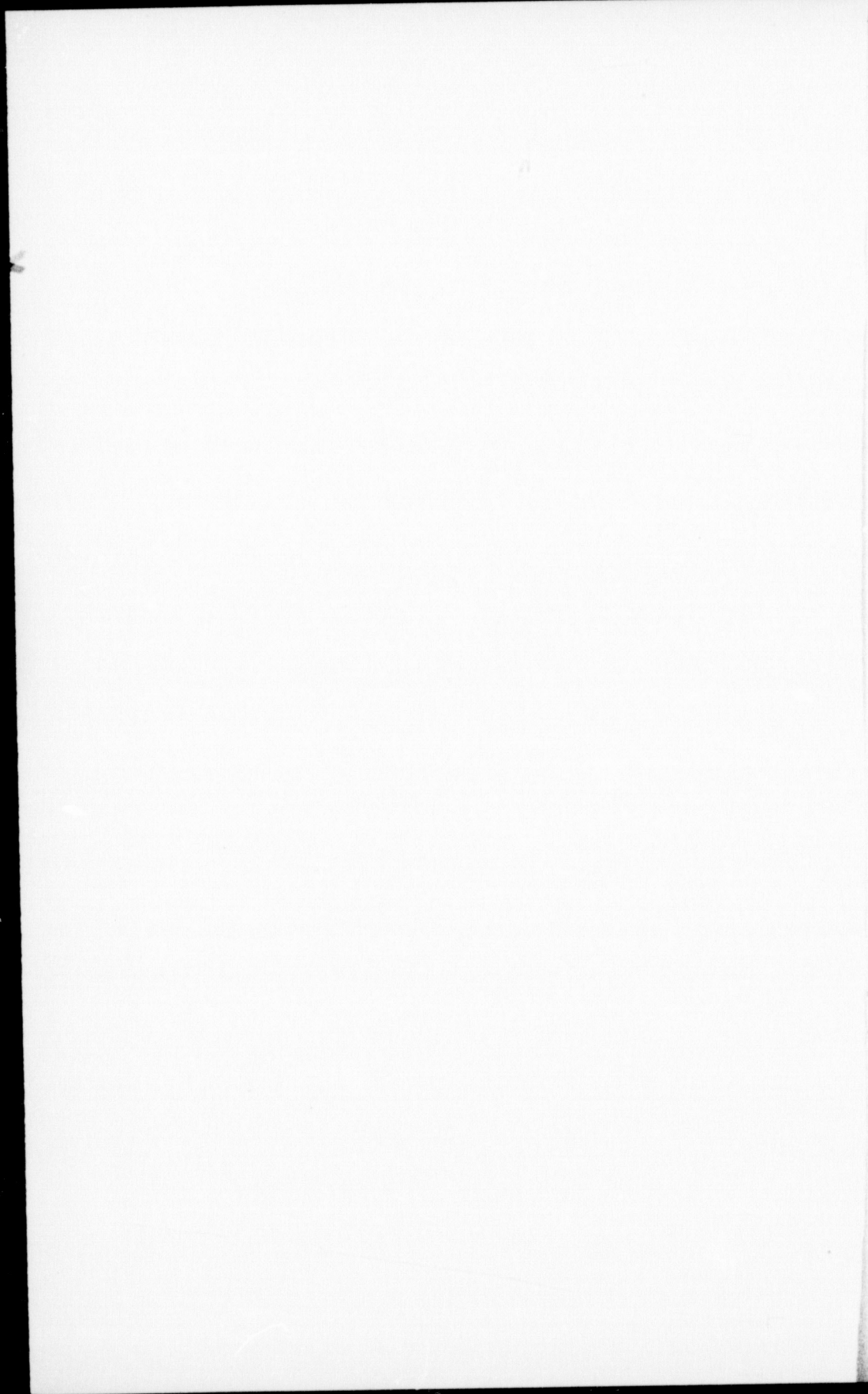


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
The Government's Case	2
The Defense Case	6

ARGUMENT:

POINT I—It is not an element of the crime of conspiracy to violate Section 2113(c) of Title 18, United States Code, that the conspirators know that the deposits of the bank from which the property they are conspiring to dispose of came were insured by the Federal Deposit Insurance Corporation	6
POINT II—The evidence was more than sufficient to establish Mauro's participation in the conspiracy charged	16
POINT III—The evidence was more than sufficient to sustain Mauro's conviction on the substantive count	17
CONCLUSION	18

TABLE OF CASES

<i>Lubin v. United States</i> , 313 F.2d 419, 422 (9th Cir. 1963)	7
<i>Nassif v. United States</i> , 370 F.2d 147 (8th Cir. 1966)	9
<i>Nelson v. United States</i> , 415 F.2d 483 (5th Cir. 1969), cert. denied, 396 U.S. 1060 (1970)	7, 8
<i>Pinkerton v. United States</i> , 328 U.S. 640 (1946)	17

<i>United States v. Alsondo</i> , 486 F.2d 1339 (2d Cir. 1973), cert. granted, 42 U.S.L.W. (April 15, 1974)	6, 9, 10, 11, 12, 14
<i>United States v. Cimini</i> , 427 F.2d 129 (6th Cir. 1970)	9
<i>United States v. Crimmins</i> , 123 F.2d 271 (2d Cir. 1941) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15	
<i>United States v. D'Amato</i> , Dkt. No. 73-2437 (2d Cir., March 14, 1974)	16
<i>United States v. De Marco</i> , 488 F.2d 828 (2d Cir. 1973)	6, 9
<i>United States v. Dotterweich</i> , 320 U.S. 277 (1943)	11
<i>United States v. Fields</i> , 466 F.2d 119 (2d Cir. 1972)	9
<i>United States v. Freed</i> , 401 U.S. 601 (1971)	13, 14, 15
<i>United States v. Gallishaw</i> , 428 F.2d 760 (2d Cir. 1970) 8, 12	
<i>United States v. Houle</i> , 490 F.2d 167 (2d Cir. 1973)	6, 9
<i>United States v. Lupino</i> , 480 F.2d 720 (8th Cir.), cert. denied, 414 U.S. 924 (1973)	14
<i>United States v. Mack</i> , 112 F.2d 290 (2d Cir. 1940)	14
<i>United States v. Manfredi</i> , 488 F.2d 596 (2d Cir. 1973)	16
<i>United States v. Marrapese</i> , 486 F.2d 918 (2d Cir. 1973)	16
<i>United States v. Pui Kan Lam</i> , 483 F.2d 1202 (2d Cir. 1973)	17
<i>United States v. Rizzo</i> , 491 F.2d 1235 (2d Cir. 1974)....	6, 9
<i>United States v. Roselli</i> , 432 F.2d 879 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971)	9
<i>United States v. Ruiz</i> , 477 F.2d 918 (2d Cir. 1973)	17
<i>United States v. Schaar</i> , 437 F.2d 886 (7th Cir. 1971)	8

<i>United States v. Schwartz</i> , 464 F.2d 499 (2d Cir. 1972), cert. denied, 409 U.S. 1009 (1973)	15
<i>United States v. Sherman</i> , 171 F.2d 619 (2d Cir. 1948), cert. denied as <i>Whelan v. United States</i> , 337 U.S. 931 (1949)	8, 14
<i>United States v. Thompson</i> , 476 F.2d 1196 (7th Cir.), cert. denied, 414 U.S. 918 (1973)	9
<i>United States v. Vasquez</i> , 429 F.2d 615 (2d Cir. 1970)	17
<i>United States v. Vilhotti</i> , 452 F.2d 1186 (2d Cir. 1971), cert. denied, 406 U.S. 947 (1972)	8, 10, 11, 12, 14
<i>United States v. Wisniewski</i> , 478 F.2d 274 (2d Cir. 1973)	17

OTHER AUTHORITIES

<i>Developments in the Law—Criminal Conspiracy</i> , 72 Harv. L. Rev. 920 (1959)	9
Friedman (ed.), <i>Argument: The Complete Oral Argument Before the Supreme Court in Brown v. Board of Education</i> (New York 1969)	9

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1270

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSEPH MAURO,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Joseph Mauro appeals from a judgment of conviction entered on January 30, 1974, in the United States District Court for the Southern District of New York after a four day trial before the Honorable Robert J. Ward, United States District Judge, and a jury.

Indictment 73 Cr. 489, filed May 24, 1973, charged Pasquale Cocco, Joseph Mauro and Bruce Romanoff in two counts with conspiracy to dispose of cashiers checks stolen from the First National City Bank, in violation of Title 18, United States Code, Section 371, and with possession of the stolen cashiers checks, in violation of Title 18, United States Code, Section 2113(c).

Mauro's * trial commenced on November 19, 1973, and concluded November 23, 1973, when the jury found him guilty on both counts.

On January 30, 1974, Judge Ward sentenced Mauro to concurrent terms of two and a half years imprisonment on each count.

Mauro is at liberty pending this appeal.

Statement of Facts

The Government's Case

On February 9, 1973, Special Agent Anthony Villano of the Federal Bureau of Investigation, acting in an undercover capacity and using the name Tony Romano, met Pasquale Cocco at a social club on Nostrand Avenue in Brooklyn (Tr. 59). Cocco and Villano discussed some stock certificates which Villano had with him and which he gave to Cocco to try to sell. Cocco told Villano that he had checks stolen from the First National City Bank. Villano mentioned he had a banker who could handle "big stuff", to which Cocco responded that he had unlimited access to Israeli bonds and that if he could get his hands on some \$20 million in stolen duPont stock his boss could get five percent of its face value (Tr. 103-107). Cocco and Villano agreed to meet again on February 13, 1973 (Tr. 60).

On the evening of February 13, 1973, Villano, accompanied by Herbert Olsberg, an individual cooperating with the F.B.I., drove to the bar across the street from the social

* Cocco and Romanoff pleaded guilty to Count One of the indictment on November 14, 1973. On January 30, 1974, Judge Ward sentenced Cocco to eighteen months imprisonment and Romanoff to six months imprisonment.

club where the February 9 meeting had occurred. Leaving Olsberg in the car, Villano met Cocco on the sidewalk and pointed out Olsberg, identifying him as his banker (Tr. 61-63, 109). Cocco took Villano to his apartment nearby, where Cocco retrieved the stock certificates Villano had given him, saying that they were worthless. Villano showed Cocco a counterfeit ten dollar bill and asked whether Cocco could dispose of such bills; he also told Cocco that his banker was willing to handle the stolen cashiers checks (Tr. 63, 110, 113-114). Cocco responded that they would have to see his partner, without whom he did not do business, about both matters (Tr. 64, 114). Villano cautioned Cocco not to mention the counterfeit money in front of Olsberg (Tr. 115).

Villano and Cocco then returned to the car and, together with Olsberg, drove to a home on East 39th Street in Brooklyn to meet Cocco's partner (Tr. 65-66, 140). When they arrived, Cocco left the car and soon returned with Mauro (Tr. 67, 141). Cocco introduced Olsberg to Mauro as the banker who could handle the checks, and Cocco and Mauro then concluded a conversation, apparently started before their arrival at the car, about a First National City Bank check which was "working" in Switzerland and was ready to be drawn on (Tr. 68, 131). An initial discussion between Villano and Mauro, during which Mauro examined Villano's counterfeit ten dollar bills and inquired about their cost, was terminated by Olsberg, who complained that he thought they had come there to discuss the stolen checks (Tr. 69-71, 142). Cocco then said that he, Mauro and their boss had four cashiers checks stolen from the First National City Bank, each with a face amount exceeding \$2 million and totaling some ten million dollars (Tr. 71, 144). Cocco asked Olsberg whether he could handle such checks, and Olsberg responded that it depended on a lot of different things (Tr. 72, 75-76). Both Mauro and Cocco assured Olsberg that the signatures on the

checks were perfect forgeries (Tr. 74-75). Cocco told Villano and Olsberg that they had deposited one such check for \$2.5 million in a bank in Canada, that it had been transferred to Switzerland, that six or seven weeks had gone by and that they were preparing to draw on the proceeds (Tr. 76-77, 145).^{*} Mauro mentioned that another check for \$2.5 million had been given to someone who was "shopping" it and that they were going to call the check back (Tr. 125-126). Mauro asked Olsberg how much he could get for the checks, to which Olsberg responded that he couldn't then say (Tr. 144-145, 200). Mauro and Cocco explained that their terms were that they were to share 2½ percent of the face value of the checks and that their boss was to get 23 percent (Tr. 78, 144-145). Mauro inquired when he and Cocco might get their cut, and Olsberg said he didn't know (Tr. 146). Finally, Cocco indicated that Villano and Olsberg should come to Paxton's restaurant in Manhattan on February 16, when they would meet the boss and see the stolen checks (Tr. 79-80).

On February 16, 1973, Villano and Olsberg met Cocco, who was accompanied by an individual named Mario,** at Paxton's restaurant. After reminding Olsberg again of the way the proceeds of the cashiers checks were to be split and mentioning that he would have to talk again with his partner, Mauro, Cocco produced a xerox copy of one of the stolen checks for Olsberg to examine (Tr. 80-81, 147-149). Cocco then indicated that while he did not expect

^{*} The Government established that a First National City Bank cashiers check stolen at the same time as the three ultimately recovered from the conspirators here (see page 5, fn., *infra*) had been negotiated in that amount at the Union Bank of Switzerland (Tr. 24; GX 5). That check bore No. 2670679; the numbers on the three other checks recovered were 2670678, 2670680 and 2670681.

^{**} Mario was not the boss. At the outset of their discussion that night Cocco explained that the boss could not make it because he was tied up with something else (Tr. 81).

Villano and Olsberg to buy the checks for cash, as evidence of good faith they would have to deposit some money in an escrow account to be held in the names of Olsberg and Cocco's boss. A figure of \$25,000 was agreed upon (Tr. 81-82, 149-150). A further meeting was arranged for February 20 at Paxton's (Tr. 82, 151).

On February 20, Villano and Olsberg went to Paxton's restaurant, but Cocco did not appear. The following day Villano called Cocco, and a rendezvous at Paxton's was fixed for February 27 (Tr. 82-84, 150).

On February 27, Villano and Olsberg met Cocco at Paxton's and were introduced to Cocco's boss, Bruce Romanoff. After dinner, Cocco and Villano withdrew to the bar (Tr. 151). Romanoff then showed Olsberg xerox copies of three First National City Bank checks (Tr. 152). Cocco and Villano then returned from the bar, and after the details of the division of the proceeds between Romanoff, Mauro and Cocco were again reviewed, Romanoff made an unsuccessful attempt to raise the amount of "front money" to \$50,000 (Tr. 85-86, 153-154). After further discussions in private between Olsberg and Romanoff, Cocco was dispatched to get Romanoff's briefcase from the trunk of Romanoff's car. Cocco returned with the briefcase, and he and Villano withdrew again to the bar while Romanoff removed the three stolen cashiers checks from the briefcase and showed them to Olsberg (Tr. 88, 155-157; GX 2, 3 and 4). At this moment F.B.I. agents on surveillance outside the restaurant arrested Romanoff and seized the three cashiers checks (Tr. 226-227).*

* The three cashiers checks seized from Romanoff were among six in consecutive series stolen from the Broadway and 56th Street branch of the First National City Bank by a junior clerk there (Tr. 10-40). Each check recovered from Romanoff was made out in an amount exceeding \$2.6 million. The authorized signatures on the checks were forged (Tr. 46-57). The deposits of the First National City Bank were insured by the Federal Deposit Insurance Corporation at the time of the theft (Tr. 25).

The Defense Case

The defense called Pasquale Cocco as a witness, and Joseph Mauro took the stand in his own defense. Mauro denied any knowledge of the stolen First National City Bank checks, and he and Cocco, while conceding that they were friends and that there had been a meeting between Mauro, Cocco, Villano and Olsberg on February 13, claimed that the only matter discussed at that meeting was counterfeit money. Cocco claimed that the first time that the stolen First National City Bank checks had been discussed with Villano and Olsberg was at the February 16 meeting at Paxton's (Tr. 253-272, 279-327).

On cross examination, Cocco admitted that he had learned about the stolen checks from Romanoff long before the February 13 meeting and had been actively attempting to dispose of them (Tr. 322-324).

ARGUMENT

POINT I

It Is Not an Element of the Crime of Conspiracy to Violate Section 2113(c) of Title 18, United States Code, That the Conspirators Know That the Deposits of the Bank From Which the Property They Are Conspiring to Dispose of Came Were Insured by the Federal Deposit Insurance Corporation.

Relying on a doctrine announced by Judge Learned Hand in *United States v. Crimmins*, 123 F.2d 271 (2d Cir. 1941) which is very much still the law in this Circuit, *United States v. Rizzo*, 491 F.2d 1235 (2d Cir. 1974); *United States v. Houle*, 490 F.2d 167 (2d Cir. 1973); *United States v. De Marco*, 488 F.2d 828 (2d Cir. 1973); *United States v. Alsondo*, 486 F.2d 1339 (2d Cir. 1973), *cert. granted*, 42

U.S.L.W. 3573 (April 15, 1974), Mauro contends for the first time on appeal that his conviction for conspiracy to dispose of property stolen from a federally insured bank must be reversed because the Government did not prove what Mauro claims was an element of that offense—knowledge on his part that the bank the stolen property of which he conspired to dispose of was insured by the Federal Deposit Insurance Corporation. For the reasons that follow, the Government respectfully contends that the *Crimmins* doctrine is inapplicable to conspiracies to violate Section 2113 of Title 18 and that the cases purporting to follow *Crimmins* which can be read to suggest that proof of knowledge of the federally insured character of a bank is required in Section 2113 conspiracy cases are wrongly decided and should not be followed.

Mauro's contention that at trial the Government failed to establish his knowledge that the First National City Bank was insured by the Federal Deposit Insurance Corporation is, of course, completely accurate. At trial the Government's proof established that Mauro knew that the property he was conspiring to dispose of had been stolen from the First National City Bank. The Government also proved that the deposits of that bank were insured by the Federal Deposit Insurance Corporation. However, the indictment did not allege and the Government did not prove that Mauro knew that the First National City Bank was federally insured, and Judge Ward did not charge the jury that they had to so find to convict on Count One. Of course, Mauro does not claim that knowledge that the First National City Bank was federally insured is an element of the substantive violation of Section 2113(c), and properly so. *Nelson v. United States*, 415 F.2d 483, 486-487 (5th Cir. 1969), cert. denied, 396 U.S. 1060 (1970). *Lubin v. United States*, 313 F.2d 419, 422 (9th Cir. 1963). Indeed, it appears that a substantive violation of Section 2113(a) and (b) can be made out without proof that the defendant knew that what he was robbing was a bank, much less one that was federally

insured. See *United States v. Schaar*, 437 F.2d 886 (7th Cir. 1971).

Mauro's contention that knowledge of the federally insured character of a bank is an element of a conspiracy to violate Section 2113(c) is not supported by the citation in his brief of any authority precisely announcing that principle. The Government has uncovered no case, in this Circuit or elsewhere, that holds that the Government must prove knowledge of the federally insured character of the bank to make out a conspiracy to violate any of the subsections of Section 2113. And indeed, *Nelson v. United States*, *supra*, holds that knowledge of the federally insured character of the bank robbed is *not* an element of a conspiracy to violate Section 2113(c). Moreover, in *United States v. Gallishaw*, 428 F.2d 760, 763 (2d Cir. 1970), this Court, speaking through the same Circuit Judge who later wrote the opinions in *United States v. Alsondo*, *supra*, reversed a conviction for conspiracy to rob a federally insured bank because of the trial judge's failure to charge that the defendant had to know that the object of the conspiracy was the robbery of a bank. The Court relied for this proposition on *Nelson v. United States*, *supra*, and, although the opinion cited *United States v. Crimmins* in support of its conclusion that Gallishaw had to have known a bank was to be robbed to be convicted of conspiracy to violate Section 2113(a) of Title 18, it did not suggest that the law also required that he have known that the bank was federally insured.

Mauro's reliance on *United States v. Crimmins*, *supra*, and its progeny is hardly misplaced, however, and while it is possible that *Crimmins* itself is distinguishable, the reasoning of a number of the cases in this Circuit which have purported to follow it is clearly as applicable here as it was in those cases. *United States v. Sherman*, 171 F.2d 619 (2d Cir. 1948), *cert. denied* as *Whelan v. United States*, 337 U.S. 931 (1949); *United States v. Vilhotti*, 452 F.2d 1186 (2d

Cir. 1971), *cert. denied*, 406 U.S. 947 (1972); *United States v. Fields*, 466 F.2d 119 (2d Cir. 1972); *United States v. Alsondo*, *supra*; *United States v. De Marco*, *supra*; *United States v. Houle*, *supra*; *United States v. Rizzo*, *supra*. We respectfully suggest that those cases are wrongly decided, that no more knowledge should be required for conviction of conspiracy to violate Section 2113(c) than for conviction of its substantive violation, and that to the extent that *Crimmins* itself dictates the holdings in the cases cited just above, it, too, is wrongly decided. We submit that the Government did not have to prove that Mauro knew the First National City Bank was federally insured to make out the offense charged in Count One of the indictment. While it may be that "... [S]omewhere, sometime to every principle comes a moment of repose, when it has been so often announced, so confidently relied upon, so long continued, that it passes the limits of judicial discretion and disturbance",* the *Crimmins* doctrine has not reached that pinnacle, in view of its rejection in other Circuits, *United States v. Roselli*, 432 F.2d 879, 891-892 (9th Cir. 1970), *cert. denied*, 401 U.S. 924 (1971); *United States v. Thompson*, 476 F.2d 1196 (7th Cir.), *cert. denied*, 414 U.S. 918 (1973) (opinion by Mr. Justice Douglas, dissenting), *Nelson v. United States*, *supra*,** its criticism by the commentators, *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 938-939 (1959), its questioning by this Court, *United States v. Alsondo*, *supra*, 486 F.2d at 1344, and the granting by the Supreme Court of the Government's petition for *certiorari* on this very question in *United States v. Alsondo*, *supra*, which suggests that the final word has not yet been spoken. This Court has never held the *Crimmins* doctrine applicable in the context of Section 2113, and because its application to that Section

* John W. Davis, as reported in Friedman (ed.), *Argument: The Complete Oral Argument Before the Supreme Court in Brown v. Board of Education*, 1952-55 (New York, 1969).

** But see *United States v. Cimini*, 427 F.2d 129 (6th Cir. 1970); *Nassif v. United States*, 370 F.2d 147 (8th Cir. 1966).

would be its *reductio ad absurdum*, the *Crimmins* doctrine should at the very least be limited to those contexts in which it has been already applied.

In *Crimmins* the proof established that on several occasions, Crimmins, a lawyer in Syracuse, New York, received and disposed of stolen bonds which were brought to him by a confederate from New York City. The Court noted explicitly that the evidence established that Crimmins knew the bonds were stolen, and the proof established implicitly that Crimmins knew that the bonds were being transported from the place of their theft to his confederate in New York City and by him to Syracuse. However, because the Government did not prove that Crimmins actually knew that the bonds were being transported across state lines, his conviction for conspiracy to transport stolen bonds in interstate commerce was reversed, even though he had clearly agreed that stolen bonds should be transported to Syracuse from New York, having been brought there from other places unknown to him, even though the proof showed that the bonds were in fact being transported in interstate commerce, and even though the Court assumed that Crimmins could have been convicted of the substantive crime. In short, the reason for reversal in *Crimmins* was based upon the fact that Crimmins was not shown to have agreed that the stolen bonds he was receiving be, or to have known that they were being, transported in interstate commerce. Cases following *Crimmins* have applied its doctrine in reversing convictions of conspiracy to violate a number of different federal statutes. See the cases collected in *United States v. Vilhotti, supra*, 452 F.2d at 1189; *United States v. Alsondo, supra*.

In *Crimmins* this Court's conclusion that the conspiracy must comprise an agreement or understanding with respect to the facts supporting that element of the offense providing federal jurisdiction was based solely on an analogy which the opinion apparently thought conclusively proved the

point, the so-called "traffic light" analogy which has been frequently relied on in cases following *Crimmins*, e.g., *United States v. Vilhotti*, *supra* 452 F.2d at 1190; *United States v. Alsondo*, *supra*, 486 F.2d at 1342-1343:

"While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light, for one cannot agree to run past a light unless one supposes that there is a light to run past." 123 F.2d at 273.

The seductiveness of the traffic light analogy lies in the fact that Judge Hand undoubtedly stated a logical principle; the vice of the analogy is that such a principle is of little relevance to the issue that confronted this Court in *Crimmins* and still less in this case, *Vilhotti* and *Alsondo*.

First, the use of the traffic light analogy is highly misleading because it hypothesizes a statute which provides for substantive criminal liability without either criminal intent or knowledge of facts which would disclose to a potential defendant the wrongfulness and probable illegality of his conduct. And while a substantive statute may constitutionally impose a criminal penalty upon a member of a specific class of identifiable individuals (in the case of traffic lights, automobile drivers) even in the absence of knowledge and criminal intent, *United States v. Dotterweich*, 320 U.S. 277 (1943), it is quite another matter to punish an agreement to do an act innocent in itself when the parties to the agreement are unaware that what they are agreeing to do involves a violation of law and are not members of the class the draconian substantive statute applies to. An obvious reason for this is that the harm to society from the actual performance of a criminal act may warrant imposition of criminal penalties upon an individual who acted innocently; however, when there is no more than an agreement with an innocent but prohibited object, the harm to society is sub-

stantially less, and the injustice of imposing criminal penalties on persons lacking criminal intent and knowledge of the illegality of their intended conduct is considerably greater. Thus the traffic light analogy gains hidden persuasiveness from the law's reluctance to punish inchoate crimes committed without knowledge or criminal intent. However, this case, *Vilhotti*, *Alsondo* and *Crimmins* simply do not involve this issue, for in this case and the others the defendants had ample and detailed knowledge of the precise criminal conduct they were charged with conspiring to engage in and clearly were within the class of individuals the substantive statute was intended to apply to.

Secondly, the traffic light analogy is wholly inapposite here because there could be no agreement of the kind there postulated in the absence of knowledge of the existence of the traffic light. One cannot agree to do an act with respect to an object without knowledge of such an object's existence, and the traffic light analogy proves no more than that logical proposition. However, the need to know of a particular object's existence in order to conspire to possess, rob, assault or dispose of it is quite a separate notion from a need to be aware of some invisible aspect of such an object which supports a jurisdictional basis for the application of federal criminal statutes. While it may be that one cannot conspire to rob a bank without knowing that a bank is to be robbed, *United States v. Gallishaw*, *supra*, 428 F.2d at 763, it is clearly another matter to say that one cannot conspire to rob a federally insured bank without knowledge that it is federally insured.*

* An analogy apposite for this case would be based on a hypothesized statute providing: "It shall be a violation of law for any person to drive without stopping past any stop sign erected pursuant to an order of the Highway Commissioner." The analogy would then be, under the *Crimmins* rule:

"While one may, for instance, be guilty of running past a stop sign erected pursuant to an order of the Highway Commissioner without knowledge of the existence of

In short, the traffic light analogy does not support the principle on which *Crimmins* and its progeny rest—that a conspiracy must embrace knowing agreement to every element of the substantive crime. Moreover, such a principle is not the law. *United States v. Freed*, 401 U.S. 601, 607-610 (1971). In *Freed*, the defendants were charged with possession and conspiracy to possess hand grenades which had not been registered in the National Firearms Registration and Transfer Record as required by law. Title 26, United States Code, Section 5861(d). The District Court dismissed the indictment for its failure to allege that the defendants knew the hand grenades they were charged with possessing and conspiring to possess were in fact unregistered. The Supreme Court reversed the District Court, holding that hand grenades are of such a character that their possession, and an agreement to possess them, could not be of innocent character, and that the defendants' knowledge that the hand grenades were unregistered (as distinct from proof that the hand grenades were in fact not registered) was not an element of the substantive offense or a conspiracy to commit it, the requisite knowledge for conspiracy and the substantive offense being the same. In short, the Court in *Freed* required no more knowledge and intent for conspiracy to violate the substantive statute than for the substantive crime itself, although the statute was "a regulatory measure in the interest of public safety" which imposed strict liability, 401 U.S. at 609, as was the hypothesized statute in the traffic light analogy. In doing so, the Court in *Freed* upheld the imposition of criminal penalties in a context in which a defendant could agree to do an act he did not know to be wrongful and contrary to law; the Court assumed, somewhat hesitatingly, that one

the order, one cannot be guilty of conspiring to run past such a sign without knowledge that the Highway Commissioner ordered it erected."

The questionable validity of such a rule appears from its mere recitation.

could not suppose that a conspiracy to possess hand grenades was an innocent act. 401 U.S. at 609 n. 14. Section 2113 is no such strict liability statute, however, and here Mauro can have had no doubt whatsoever that he was a participant in a criminal conspiracy to dispose of property stolen from a bank. Moreover, even in the context of a strict liability statute, *Freed* establishes that the construction of the conspiracy statute in such cases as *Crimmins*, *Sherman*, *Vilhotti* and *Alsondo* is erroneous.

The foregoing establishes that a defendant may be convicted of conspiracy to violate a substantive statute without agreement or knowledge with respect to every element of that substantive crime, certainly when the element unknown to the defendant is merely the jurisdictional basis for the application of federal law and, indeed, even if the element is part of the gravamen of the offense. Even Judge Hand appears to have recognized this in a decision predating *Crimmins*. *United States v. Mack*, 112 F.2d 290 (2d Cir. 1940).^{*} *Freed* establishes that, in the absence of Congressional intent to the contrary, neither the Constitution nor the conspiracy statute (18 U.S.C. § 371) require that the Government plead and prove knowledge of the jurisdictional element to sustain a conviction for conspiracy if such knowledge is not a prerequisite to conviction for the substantive crime.^{**} See also *United States v. Lupino*, 480 F.2d 720, 724 (8th Cir.), *cert. denied*, 414 U.S. 924 (1973). Here, as noted above, knowledge of the federally insured character of a bank is not an element of a substantive crime charged under Section 2113. The Congressional purpose in enacting Section 2113 was clearly to provide federal

^{*} How *Mack* can be read consistently with *Crimmins* and particularly with *United States v. Sherman*, *supra*, is a mystery if, as it appears, *Crimmins* purports to recite a canon of the law of conspiracy.

^{**} And, of course, in none of the cases following *Crimmins* has the missing element of knowledge been held a requisite for conviction of the substantive offense.

criminal penalties for depredations against federally insured banks, regardless of a defendant's knowledge of their federally insured character. It would do great violence to this Congressional purpose if conspiracies against such banks could only be punished if defendants actually knew of their federally insured character, and it can hardly be argued that the Constitution requires or that Congress intended to require such knowledge in punishing participants in such conspiracies. Indeed, it seems fair to conclude that to require proof of such knowledge would, except in very rare instances, effectively preclude federal prosecution of conspiracies to violate Section 2113 of Title 18. Neither the Constitution, the statutes, logic or fairness require such a result. As this Court, relying on *United States v. Freed*, has noted in a similar context, an agreement to perform the acts which would violate a substantive statute is sufficient to sustain a charge of conspiracy to violate that statute. *United States v. Schwartz*, 464 F.2d 499, 509-510 (2d Cir. 1972), *cert. denied*, 409 U.S. 1009 (1973). While this particular formulation might still leave outside its ambit a conspiracy case like *Crimmins* itself, where the Court found no agreement that the transportation of the stolen bonds include areas outside of New York State,* it clearly would apply to a case where there is an agreement to possess goods stolen in interstate commerce, though the conspirators do not know the goods had been so stolen, a conspiracy to assault federal officers, though the conspirators do not know that the persons they agree to assault are federal officers, or, as in this case, a conspiracy to dispose of property known to have been stolen from a bank, where the conspirators do not know that the deposits of the bank were insured by the Federal Deposit Insurance Corporation. No more should be required.

* The importance of where the bonds were to be transported seems of little significance to the scope of the conspiracy so long as there was an agreement to transport them, as there clearly was in *Crimmins*.

POINT II

The Evidence Was More Than Sufficient to Establish Mauro's Participation in the Conspiracy Charged.

Mauro complains that the evidence of his participation in the February 13 meeting with Villano, Olsberg and Cocco was insufficient to support a guilty verdict on Count One. The contention is clearly frivolous.

The discussion at the February 13 meeting established, primarily from statements by Mauro himself, that he was involved in a venture with Cocco and a boss who proved to be Romanoff to dispose of several cashiers checks stolen from the First National City Bank, each made in an amount exceeding \$2.5 million. The discussion on February 13 established that Mauro knew about the stolen checks, their forgery, and other attempts made to dispose of some of them. Moreover, while what Villano and Olsberg were able to recollect about the February 13 meeting indicated that Cocco did most of the talking, the fact that Cocco, whose participation in the conspiracy with Romanoff is not disputed, insisted on having Mauro, whom he said was his partner in the venture, present at that meeting, and the fact that Cocco was prepared to discuss such a criminal transaction with Mauro present establishes that Mauro was no idle spectator. Finally, and most compellingly, Mauro's own statements at the February 13 meeting established that he had a financial stake in the disposal of the stolen checks, and the proposed division of the proceeds of the venture described by Mauro on February 13 was confirmed by Cocco both on February 16 and in Romanoff's presence on February 27. In short, there was more than enough evidence to sustain the jury's verdict. *United States v. D'Amato*, Dkt. No. 73-2437 (2d Cir., March 14, 1974); *United States v. Manfredi*, 488 F.2d 588, 596-597 (2d Cir. 1973); *United States v. Marrapese*, 486 F.2d 918 (2d Cir.

1973); *United States v. Wisniewski*, 478 F.2d 274, 279-280 (2d Cir. 1973); *United States v. Pui Kan Lam*, 483 F.2d 1202, 1208 (2d Cir. 1973); *United States v. Ruiz*, 477 F.2d 918 (2d Cir. 1973); *United States v. Vasquez*, 429 F.2d 615 (2d Cir. 1970).

POINT III

The Evidence Was More Than Sufficient to Sustain Mauro's Conviction On The Substantive Count.

Relying on his argument that the evidence was insufficient on the conspiracy count, Mauro claims that his conviction on Count Two for substantive violation of Section 2113(c) of Title 18 must also be reversed because Count Two was submitted to the jury with a *Pinkerton** charge. However, it is clear (see Point II, *supra*) that there was sufficient evidence upon which the jury could find Mauro guilty of the conspiracy. Moreover, since knowledge that the First National City Bank was federally insured was not necessary for conviction on Count Two, that conviction need not be reversed because of the *Pinkerton* charge even if the Court should find such knowledge required for conviction on the conspiracy charged in Count One. *United States v. Alsondo*, *supra*, 486 F.2d at 1346-1347.

* *Pinkerton v. United States*, 328 U.S. 640 (1946).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

JOHN D. GORDAN III,
S. ANDREW SCHAFFER,
*Assistant United States Attorneys,
Of Counsel.*

MICHAEL C. EBERHARDT,
*Special Attorney,
United States Department of Justice.*

AFFIDAVIT OF MAILING

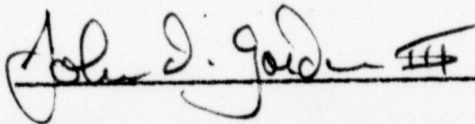
STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOHN D. GORDAN III being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 25th day of April, 1974
he served 2 copies of the within brief by placing the
same in a properly postpaid franked envelope addressed:

AARON SCHACHER, ESQ.
32 Court Street
Brooklyn, N. Y.

And deponent further says that he sealed the said en-
velope and placed the same in the mail drop for mailing
at the United States Courthouse, Foley Square, Borough
of Manhattan, City of New York.



Sworn to before me this

25th day of April, 1974

JEANETTE ANN GRAYB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1976

